Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

STANLEY WILLIAM STARK and PATRICIA GARNET STARK,

Cross-Petitioners,

v.

EMC MORTGAGE CORPORATION,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Prejudgment interest**. A Missouri statute requires that parties pay prejudgment interest on liquidated claims. If the arbitration contract does not specify an interest rate, the statute sets the rate at 9%.

   Did the Eighth Circuit err by not awarding prejudgment interest on the arbitration award at 9%?

2. **Remand**. The parties agreed to arbitrate all matters in question. The Eighth Circuit refused to remand the prejudgment-interest question to the arbitrator.

   Did the Eighth Circuit err by not remanding the prejudgment-interest question to the arbitrator?

PARTIES TO THE PROCEEDING

The following defendants below are also being served as respondent herein: Sandberg, Phoenix & von Gontard, P.C.; Scott Greenberg; and SPvG Trustee.

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The Starks respectfully petition the Court for a writ of certiorari to review the Eighth Circuit Court of Appeal's judgment under Missouri law denying the Starks prejudgment interest at 9% on Judge Mason's award in this case.

OPINIONS AND ORDERS BELOW

The Eighth Circuit's November 29, 2004 decision denying the Starks prejudgment interest on Judge Mason's award is not reported.[1] Judge Mason's November 25, 2002 award is not reported.[2]

STATEMENT OF JURISDICTION

On February 5, 2005, the Clerk of this Court docketed EMC's petition for writ of certiorari. Rule 12.5 permits the Starks to file a conditional cross-petition for writ of certiorari before March 7, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Mo. Rev. Stat. § 408.020 provides:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due

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[1] Cross Pet. App. 1a.

[2] Pet. App. 22a-23a.

for the forbearance of payment whereof an express promise to pay interest has been made.

STATEMENT OF THE CASE

The Starks refer the Court to the statement of the case in their opposition brief and the Eighth Circuit's opinion, Section I.[3] On November 25, 2002, Judge Mason issued his award. After the Eighth Circuit found in the Starks' favor, the Starks requested that the Court of Appeals include prejudgment interest under Missouri law in the mandate. The Eighth Circuit denied the Starks' prejudgment-interest request.[4] Denying the Starks' request contravenes a Missouri statute and Eighth Circuit case law. On December 3, 2004, EMC finally paid the judgment.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Missouri law provides that liquidated claims must earn prejudgment interest. When an arbitrator enters an award, the claim is liquidated, even if one party disputes the award in confirmation. If the arbitration agreement does not specify an interest rate, the statutory 9% rate applies. The Starks request that the Court reverse the Eighth Circuit and order EMC to pay prejudgment interest on the award. But if the Court decides to remand the issue, the remand must be directly to the arbitrator, Judge Mason.

1. The Court should award the Starks prejudgment interest.

A Missouri statute, § 408.020, provides for prejudgment interest on liquidated claims. The Eighth Circuit has held

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[3] Pet. App. 2a-4a.

[4] Cross Pet. App. 1a.

that state law governs prejudgment interest.[5] The Eighth Circuit stated "[c]reditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts. . . ."[6] Section 408.020 applies when the amount due on a party's contract claim is liquidated, meaning fixed or certain.[7] A court must award prejudgment interest on liquidated claims.[8]

When an arbitration award makes no provision for interest, Missouri law entitles the successful party to interest on the award until the other party satisfies the judgment.[9] Section 408.020 applies to arbitration awards and requires that courts award prejudgment interest whenever the arbitrator liquidates the amount due.[10] Courts do not have a choice in the matter. "The award of prejudgment interest in a case in which section 408.020 is applicable is not a matter of court discretion; it is compelled."[11] A court must award

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[5] *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1987) (citing *California & Hawaiian Sugar Co. v. Kansas City Terminal Warehouse Co.*, 788 F.2d 1331, 1333 (8th Cir. 1986)).

[6] *Slay Warehousing Co. v. Reliance Ins. Co.*, 489 F.2d 214, 215 (8th Cir. 1974) (per curiam) (citing Mo. Rev. Stat. § 408.020).

[7] *Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 6 (Mo. 1987); *Dierker Assocs. v. Gillis*, 859 S.W.2d 737, 746 (Mo. App. 1993).

[8] *Slay Warehousing Co. v. Reliance Ins. Co.*, 489 F.2d 214, 215 (8th Cir. 1974) (per curiam).

[9] *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986).

[10] *Nat'l Ave. Bldg. Co. v. Stewart*, 972 S.W.2d 649 (Mo. App. 1998) (citing *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737, 746 (Mo. App. 1993)). *See also Schnucks Carrollton Corp. v. Bridgeton Health and Fitness, Inc.*, 884 S.W.2d 733, 740 (Mo. App. 1994).

[11] *Watters v. Travel Guard Int'l*, 136 S.W.3d 100 (Mo. App. 2004) (*citing Baris v. Layton*, 43 S.W.3d 390, 398 (Mo. App. 2001) (*quoting Holtmeier v. Dayani*, 862 S.W.2d 391, 407 (Mo. App. 1993))).

interest, even if one party disputes confirmation of the arbitrator's award.[12] So § 408.020 entitles the Starks to prejudgment interest on this arbitration award.

Once the Eighth Circuit reinstated the award, including the award on the state-law-intentional-tort claims, the Starks requested that the Eighth Circuit insert into the mandate interest on the award's unpaid portion at the 9% state rate. The Starks relied on Fed. R. App. Proc. 37 and 39, § 408.020, and *Stroh Container Co. v. Delphi Industries, Inc.*[13] Yet the Eighth Circuit denied the Starks' request.

Awarding prejudgment interest serves two purposes:

- To compensate prevailing parties for the true costs of money damages incurred; and

- Where liability and the amount of damages are fairly certain, to promote settlement and deter the defendant's attempts to benefit unfairly from inherent litigation delays.[14]

In *Stroh*, the Eighth Circuit held prejudgment interest is proper, stating, "Schlitz, the opposing party, has had the use of the money in the interim [between the award and the confirmation] and has thereby been unjustly enriched at the expense of Geocaris."[15] The Eighth Circuit pointed out that a bad-faith finding is not a prerequisite to an interest award.[16]

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[12] *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986).

[13] *Id.*

[14] *Id.* at 751 (citing *Ohio River Co. v. Peavey Co.*, 731 F.2d 547, 549 (8th Cir. 1984)).

[15] *Id.*

[16] *Id.* at 751 (citing *Hodgson v. American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971)).

Schlitz argued ordering it to pay interest on the arbitration award would discourage arbitration use. Schlitz said interest would penalize parties "for seeking judicial relief from questionable awards of arbitrators."[17] But the Eighth Circuit held that prejudgment interest does not exact a penalty, because the opposing party has had the use of the money during the course of the confirmation proceedings. In consumer cases, it is even more important that the Court not allow the corporation to wear down the consumer in confirmation by refusing to pay the award.

A. The interest rate is 9%.

The proper interest rate is the state-statutory-prejudgment-interest rate—9%.[18] The arbitration agreement defines Missouri law as the applicable substantive law.[19] Since the agreement does not specify an interest rate on the award, courts must calculate prejudgment interest at 9% under Mo. Rev. Stat. § 408.020.

B. The interest runs from November 25, 2002 until December 3, 2004.

Now that the Eighth Circuit has confirmed the award, it should apply the state interest rate for liquidated claims provided for in § 408.020 to the prejudgment period from November 25, 2002 to December 3, 2004. That is, from the date Judge Mason issued his award to the date EMC finally paid the judgment.

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[17] *Id.*

[18] *Id.*

[19] Pet. App. 9a.

2. If the Court remands the prejudgment-interest issue, the remand must be to Judge Mason.

EMC argued below that the Eighth Circuit should remand the prejudgment-interest question to the district court. In this situation, the Court has two reasonable courses to follow. The Court may either decide the prejudgment-interest issue or remand it. The Starks do not object to remand, but the remand must be to Judge Mason, not the district court.

The arbitration agreement states that Judge Mason must resolve this issue. The agreement applies to all disputes between the parties. It applies to any "Claim," which the agreement broadly defines as "any case, controversy, dispute, tort, disagreement, lawsuit, claim or counterclaim and other matters in question. . . ."[20] Prejudgment interest is a matter in question between the parties.

Precedent in this case suggests remanding to Judge Mason. After Judge Mason entered the arbitration award, the parties disagreed over whether he meant to award punitive damages of $6 million or $60 million. The district court pointed out that it would have to remand the issue to Judge Mason had it not vacated the punitive damage award.[21] Therefore, if remand is necessary, the Court should remand to Judge Mason to determine the prejudgment interest on the intentional-tort portion of the award.

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[20] Pet App. 37a.

[21] *See* Pet App. 17a n. 2.

CONCLUSION

The Starks request that this Court reverse the Eighth Circuit and award them prejudgment interest, calculated on the $6 million award at 9% from November 25, 2002 to December 3, 2004. Alternatively, if the Court decides to remand the interest issue, the Starks request that the Court remand directly to Judge Mason because the parties have agreed to arbitrate this issue.

If the Court grants EMC's petition for writ of certiorari, the Court should grant the Starks' conditional cross-petition for writ of certiorari.

Respectfully submitted,

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